Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRIAN M. FREEMAN,

Petitioner,

vs.

MOIRA JOHNSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this period of profound technological advances in the communications industry affecting both the First Amendment's concerns for an informed public and the law's historic interest in protecting an individual's reputation should this Court establish legal obligations for the media where the reporter has inconsistent information from that which he/she plans to publish but avoids inquiring of known accessible sources with knowledge so as to ascertain the truth of the information?

2. In the "purposeful avoidance of the truth" analysis set forth by this Court in *Harte-Hanks Communications, Inc. v. Connaughton* is the threshold level of "doubt" in the "obvious reason to doubt" test which is necessary to trigger a reporter's responsibility to check with known accessible sources lower than the "serious doubt" required by the New York Court of Appeals?

3. In the "purposeful avoidance of the truth" analysis set forth by this Court in *Harte-Hanks Communications, Inc. v. Connaughton* is the threshold level of "doubt" in the "obvious reason to doubt" test which is necessary to trigger a reporter's responsibility to check with known accessible sources lower than the high degree of awareness of probable falsity which is equivalent to entertaining serious doubt?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian M. Freeman ("Freeman") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in the above-captioned proceeding on June 30, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is reported at 84 N.Y.2d 52, 614 N.Y.S.2d 377, 637 N.E.2d 268

(1994) and is reprinted in the appendix annexed hereto. (1a).[1] The order of the New York Supreme Court Appellate Division - First Department is reported at 192 A.D.2d 250, 601 N.Y.S.2d 606 (1st Dept. 1993) and is set forth in the appendix. (8a). The order of the New York Supreme Court is unreported and is set forth in the appendix. (14a).

JURISDICTION

On June 30, 1994, the Court of Appeals for the State of New York rendered a decision affirming the order of the Appellate Division and granting respondent's summary judgment and dismissing petitioner's defamation complaint in its entirety. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

STATEMENT OF FACTS

1. Background

In 1986 Moira Johnston ("Johnston"), who established a reputation for herself as a writer concentrating on business affairs in general and the transportation industry in particular (A116-A117), authored a book entitled *Takeover: The New Wall Street Warriors - the Men, the Money, the Impact ("Takeover")*. (A131-A132). In her book, Johnston erroneously reported that on August 20, 1985, during the course of addressing the Board of Directors of Trans World Airlines, Inc. ("TWA"), Freeman threatened that if Frank Lorenzo ("Lorenzo"), rather than Carl

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[1] Reference to "____a" are to the appendix to this petition. References to "A____" are to "Petitioner-Appellant's Appendix" filed in support of its (Freeman's) appeal to the New York Court of Appeals and located in that record below.

Icahn ("Icahn") , was allowed to gain control of TWA, Freeman's clients, members of the International Association of Machinists ("IMA"), would resort to "the nighttime trashing of airplanes and other sabotage." (A131-A132, A136, and A143).

Sworn testimony and/or tape-recorded interviews with some key figures at the August 20th meeting, including attorney James Freund ("Freund"), financier Icahn, former TWA board member Peter Ueberroth, and former TWA President Richard Pearson, all conclusively demonstrate that Freeman *never made* the remarks attributed to him by Johnston. (*See*, A273, A299, A302, and A251-253).

2. **The Defamatory Statement**

Freeman was present for the portion of the critical TWA Board of Directors meeting at which the battle between Icahn and Lorenzo for control of the airline was ultimately determined. (A292). In describing the events as they unfolded at that meeting, *Takeover* contains the following false statement:

> Brian Freeman, the lawyer who represented the machinists, compounded the threats of strike, warning that being sold into bondage to Lorenzo would provoke nighttime trashing of airplanes and other sabotage. (A143).[2]

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[2] This statement was susceptible of the defamatory meanings that plaintiff threatened, condoned and encouraged the commission of acts of physical sabotage and other illegal conduct by his clients. Moreover, *Takeover* describes Freeman endorsing threats of violence to the TWA Board of Directors as a negotiating ploy to avoid Lorenzo's bid for control of TWA. In a decision dated December 18, 1987, denying Johnston's publisher The Hearst Corporation's motion to dismiss the first cause of action for libel the New York Supreme Court, New York County (per Justice William M. McCooe), ruled as a matter of law that:

> it is for the trier of fact to say whether the statement charged or inferred that the plaintiff, a lawyer, threatened, participated in, endorsed and/or condoned illegal conduct by his principal when he was present and spoke as a representative of the machinists. *The statement is "reasonably susceptible of a defamatory connotation."* (A87) (Emphasis added).

None of the parties has ever appealed any portion of the trial court's December 18, 1987 decision.

The published statement, which specifically refers to Freeman as a "lawyer," was widely read by members of the legal, business and financial communities who were Freeman's clients, prospective clients, and sources or potential sources of business referrals. Freeman is a respected attorney and financial consultant and was acting as financial advisor for the IMA (A5-A6). In order to vindicate his reputation in the financial, business and legal communities, Freeman demanded a written retraction from Johnston and The Hearst Corporation, the publishers of *Takeover*. (A214). After his retraction demand was rejected, Freeman commenced this defamation action. (A69-A83).

3. **Falsity and Actual Malice**

Johnston has stated that she based her statement in *Takeover* regarding Freeman on information she received from Harry Hoglander ("Hoglander") (A122), the head of the Airline Pilots' Association, the machinists' union rival in negotiations with Icahn. (A100 and A176).

The following excerpt from Johnston's transcription of her November 2, 1985 interview with Hoglander states the crux of Hoglander's remarks about Freeman:

> Then Brian Freeman got up from the machinists, and told them *what an emotional thing* it was, for them, — and you know *the machinists* who everybody looks at they're not just machinists, *they're the guys who empty the toilets and sweep the ramps, pretty rough cut guys in some instances. They don't have a lot to lose.* Told them about how Lorenzo in the airline labor world is thought as a very despicable and vicious individual who knows no bounds to his vindictiveness, and that *it was a very emotional event for his clients and there was even talk of* — over the period of time it would take Lorenzo to go through DOT hearings — *that the machinists would probably trash airplanes on their overnight layovers.* (A123). (Emphasis added).

Significantly, prior to publication, Hoglander's characterization of Freeman's remarks had been checked with and disputed,

if not directly contradicted, by a source that Johnston has conceded is unquestionably unbiased, reliable and one of Johnston's most trusted sources — James Freund, the partner at Skadden, Arps, Slate, Meagher & Flom who had served as counsel to the TWA board during the takeover battle described in Johnston's book. (A273, A276, A121, A126-A127, A196, and A203-A204). Freund, was present at the Board of Directors meeting at which Freeman, as well as Hoglander, addressed the TWA board members. (A121 and A141-A143). In an interview that was relied upon by Johnston when she wrote *Takeover* (A228), Freund unambiguously disputed Hoglander's characterization of Freeman's remarks at the August 20th board meeting. (*See*, A273).

Johnston's interview with Freund regarding the Board meeting took place on November 6, 1985, only four days after the interview with Hoglander quoted above. (A126). In that interview, (which was tape-recorded by Johnston),[3] Freund informed Johnston that at the key board meeting, *Hoglander* was the one who was "stressing" the possibility of sabotage by the machinists. (A276). Immediately after hearing Freund's statement, which contradicted what Hoglander had told her four days earlier, Johnston asked Freund: "Did Brian Freeman take a position about what the machinists might do?" (*Id.*). Freund responded by explaining to Johnston that Freeman, as an attorney and an investment banker, was too "cautious" to make the kind of threat attributed to him by Hoglander, and whatever Freeman said, "it was no big deal," expressly contrasting Freeman's approach with Hoglander's comments at that meeting. (A273).

The original transcription of Johnston's tape-recorded interview with Freund, prepared by Johnston's research assistant, Sheilagh Simpson, was used by Johnston to draft the *Takeover* manuscript.[4] Is states in relevant part:

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[3] *See*, A228 and A278-A279.

[4] *See*, A223-A224, A227-A228, A270-A273, and A278-A279.

> . . . and then some people — *some people who were dramatic who talked about sabotaging planes and [were] one of machinists going to leave a bolt off, who knows what,—it was a real concern to the dirs as to what would happen.* nobody ever weighed the diff factors that caused us to go one way or the other but that was as much a factor as any other factor and f was unable to negate that in our minds although he attempted to. *and the other guys, hogg particularly,was stressing that aspect. and nobody likes to be threatened* but once you cleared away the threat, the reality was still there: that an extraordinary thing had happened here in terms of these union employees taking these massive pay cuts and such. they must really feel strongly about this. and people that feel that strongly in the pocketbook, are capable of doing thing that may be very wild.
>
> *brian was more cautious as a lawyer, i think he's a lawr, an inv. bnkr. can't reemeber exactly waht b said, but it was no big deal.*

(A273) (Emphasis added). Freund's statement clearly apprised Johnston of the fact that Freeman did not make the statements that Hoglander had attributed to him.[5]

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[5] Immediately prior to discussing Hoglander's threat of sabotage by the machinists, Freund had discussed Hoglander's threat to the board of illegal wildcat strikes by the pilots if Lorenzo were permitted to gain control of TWA:

> *and hogglander [sic] then spoke,* he's a rather godd speaker in a rather dramatic kind of a way. but he got in some cheap shots . . . *and then very . . .a real threat of wildcat strike (that is certainly a direct contradiction of what harry says he said to the brd about wildcat strike!) which are illegal* and when he was questioned on it he pulled back, *but clearly he was threatening.* his presentation was the most dramatic of anybody, but it was overstated, but it did show a lot of feeling. (A272) (Emphasis added).

This portion of Freund's statement also should have put Johnson on notice that Hoglander's account of what went on at the board meeting was both inaccurate and self-serving. Johnston's research assistant inserted the comment that Freund's description of Hoglander's threat of wildcat strikes by the pilots "is certainly a direct contradiction of what Harry [Hoglander] says he said to the board about wildcat strike[s]!" (A271-A272).

A transcript of Johnston's interview with Freund that was prepared by Johnston's counsel, further shows that Freund's comments about Freeman were made in direct response to Johnston's question, and were intended by Freund to highlight the difference between Freeman's and Hoglander's comments at the August 20th meeting:

> (Johnston) *Did Brian Freeman take a position about what the machinists might . . .*
>
> (Freund) *Yea, yea but Brian was more cautious I think as a lawyer, I think he's a lawyer, maybe he's not, an investment banker but I think he is a little more cautious. I can't remember exactly what Brian said. [But it was no big deal].*
>
> (Johnston) *But Harry was shooting from the hip.*

(A276) (Emphasis added).[6]

Had Freeman, an attorney and investment banker, actually threatened that his clients, the machinists, would resort to sabotage if Lorenzo prevailed in his takeover attempt, it is inconceivable that Freund would have characterized Freeman's statement as "no big deal."

Clearly, Johnston asked Freund about Freeman's remarks because Freund's description of Hoglander's speech was remarkably similar to Hoglander's description of Freeman's statements. Johnston's question to Freund about Freeman's position was obviously posed for the purpose of checking the *accuracy* of Hoglander's description of Freeman's remarks. In response to her own question, Johnston was advised that Freeman's statement (in direct contrast to Hoglander's presentation) was "no big deal." Nonetheless, Johnston went ahead and

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[6] The statement in brackets reflects Freund's words which were omitted from the transcript of the Freund interview prepared by Johnston's counsel, but were included in the transcript of the Freund interview prepared by her research assistant. (Compare A276 with A272-A273). Johnston obviously knew of these statements when she wrote the book because at that time, she had only the tape and the original transcript, both of which contained these phrases. (*See*, A228, A233-A234, and A278-A279).

published as objective fact, without attribution, Hoglander's erroneous description of Freeman's alleged statement. (A143). In fact, as Freund told Johnston, and as Pearson and Freeman have attested under oath, it was Hoglander, and *not Freeman*, who made the threat of sabotage that Johnston has attributed to Freeman. (*See*, A276, A251-252, and A293).

Johnston's book, *Takeover*, purports to be a thoroughly researched factual account of the prolonged battle between Icahn and Lorenzo for control of TWA. (A136). However, Johnston interviewed very few of the seventeen "principals" (A133) identified in *Takeover's* "list" of "major players" at p. xii. (A135). Indeed, the only individuals she interviewed who actually attended the pivotal August 20th board meeting were Freund, Hoglander and Icahn. (A244). Even though she claims to have interviewed Icahn "approximately five times" during the course of researching *Takeover* (A121), she *never* questioned him about Freeman's statements. (A300). In addition, even though they are identified as "major players" in *Takeover* (A135-A136), and are referred to quite frequently in her book,[7] Johnston *never attempted* to interview TWA President and board member Richard Pearson or TWA board member Peter V. Ueberroth, or any other board members.[8]

Johnston's investigation discloses that she was more interested in telling a good story - with Hoglander as the labor "hero" - than ascertaining the truth. (A288). In *Takeover*, Johnston portrayed Hoglander's speech to the Board at the August 20th

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[7] *See, e.g.*, A136, A137, A138, A139, A141, A143, A144, A145, A149, A150 and A152.

[8] Moreover, Johnston knew that there was hostility between the pilots and the machinists. Icahn had warned her that there were class differences between the two groups, that the pilots resented the machinists and felt they should have been forced to make greater wage concessions to Icahn and that the machinists "hated the pilots." (A286). Johnston also read in the *American Lawyer* that the machinists' successful "hold-out" in negotiations with Icahn had enabled them to cut a better deal with the financier than the pilots had been able to obtain for themselves, and that the machinists additional money came at the expense of the pilots. (A124, A176 and A286).

meeting as the moral and dramatic highlight of the showdown between Lorenzo and Icahn. (A337-A341). When asked to comment on the *Takeover* manuscript before its publication, Freund cautioned Johnston against relying on the accuracy of Hoglander's account of his role at that meeting:

> Do you have anyone other than Harry telling you that his performance was as powerful as you make it sound? — My own views were decidedly mixed (as I think most observers were) — He verged over into the mawkish several times and his cheap shot at Lorenzo running an unsafe airline really soured it for me — At any rate, if the inference the reader is supposed to draw is that his speech changed votes, I don't think that's accurate. (A194-A195).[9]

4. **Decisions Below**

Freeman commenced the instant action for libel against Johnston on July 3, 1987. (*See* A73-A76).[10]

On or about September 16, 1992, after the completion of discovery, Johnston moved (pursuant to New York CPLR § 3312) for summary judgment on Freeman's cause of action for libel. (A51). Johnston sought judgment on the defamation claim on the ground that Freeman is incapable of proving that the challenged statement was published with actual malice (A57-A58).[11]

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[9] Freund did review the copy of the *Takeover* manuscript that Johnston had sent him prior to its publication. However, on his manuscript copy, he confined his correction to passages concerning his own thoughts, statements or actions. (*See* A193). He did not make any manuscript corrections that related to the accuracy of statements made by others. Moreover, he never "specifically approved" the language which ultimately appeared in *Takeover* regarding Freeman.

[10] Two other causes of action were also asserted, including one on behalf of Freeman's consulting firm. However, these two other causes of action were not involved on appeal to the New York Court of Appeals and not involved in this Petition. Furthermore, Johnson's publisher, The Hearst Corporation, was also a defendant but is similarly not involved in this Petition.

[11] In his opposition papers, Freeman had conceded that he is a "limited issue" public figure. (A14).

Justice Lebedeff denied Johnston's motion for summary judgment on Freeman's libel claim, ruling as follows:

> Plaintiff makes a strong showing that the statement made was false . . . and, moreover establishes that the author could have interviewed numerous other persons present, including plaintiff, who would have given contrary accounts . . . . Based upon the material before the court, the court determines that summary judgment cannot be reached here [because t]he particular statement at issue casts the attorney-plaintiff into the public position of reporting the deliberate plan of his client to pursue felonies, with the attorney's apparent acquiescence. To this judge's ear, that public posture cannot be reconciled with the "not a big deal" assessment made by the only other source commenting upon plaintiff's behavior, with that source being a sophisticated attorney who had reached the prominent position of counsel to TWA and a partner at Skadden Arps . . . [T]he court finds that plaintiff has raised a sufficiently "clear and convincing" challenge under the "reckless disregard" . . . standard[] to defeat summary judgment and to show entitlement to a day in court. (A16-A19, 14a).

On August 19, 1993, the Appellate Division, First Department modified the March 5, 1993 Order of the Supreme Court New York County to the extent that it granted Johnston's motion for summary judgment in its entirety. In its opinion, the First Department held that the challenged statement had not been published with constitutional malice because "the statement attributed to Freeman is a privileged description of the attitudes of the Union membership he represented, and not a blanket endorsement of illegal activity by a lawyer, as plaintiff urges." (A7, 8a).

On November 4, 1993 the New York Appellate Division, granted Freeman's motion for leave to appeal to the New York Court of Appeals, stating that "questions of law have arisen which ought to be reviewed by the Court of Appeals." (A2).

On June 30, 1994, the New York Court of Appeals rendered a decision affirming the order of the Appellate Division and granting summary judgment to Johnston dismissing the complaint. The Court of Appeals found that the evidence was insufficient to allow a rational trier of fact to find actual malice by clear and convincing evidence. The Court of Appeals rejected Freeman's contention that sufficient evidence exists to indicate that Hoglander's view of Freeman's alleged statement at the meeting was contradicted by Freund's statement. The Court considered the conflicting statement by Freund to be "equivocal at best" and a statement that might "refer to any number of considerations." (1a).

In finding that there was no showing that Freeman wrote the statement in issue with "reckless disregard for [the] truth," the Court of Appeals stated that any such finding must be supported by "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The Court then stated that the plaintiff "failed to set forth such evidence" in this case, and further:

> Neither plaintiff's alleged "conflict" between Hoglander's recollection of plaintiff's August 20 sentiments and Freund's view of his statement nor any other evidence before us can be assessed to give rise to such concerns by defendant. Defendant was thus not required to interview either the alleged maker of the statement or all of the persons allegedly present at the meeting (*See Harte-Hanks Communications v. Connaughhton*, 491 U.S. 657, 692, *supra* [failure to investigate, alone, will not support a finding of actual malice]). (1a).

The New York Court of Appeals redefined the purposeful avoidance of the truth doctrine this Court set forth in *Harte-Hanks*, and followed by the Ninth Circuit in *Masson v. New York Magazine*, 960 F.2d 896 (9th Cir. 1992). The purposeful avoidance of the truth doctrine with its "obvious reason to doubt" test as the threshold requirement in the two part purposeful avoidance analysis has been rendered meaningless by the Court

of Appeals interpretation. The Court of Appeals has raised the threshold level of "doubt" in the "obvious reason to doubt" test that is necessary to trigger the responsibility of the author/publisher to check the veracity of the informant and/or accuracy of the report well beyond the level intended by this Court as part of the purposeful avoidance doctrine (in *Harte-Hanks* and the Ninth Circuit in *Masson*). (1a).

REASONS FOR GRANTING THE PETITION

I.

Revolutionary developments in communications technology are changing the landscape of American news gathering and dissemination. Computers, satellites and cable allow information to be gathered, compiled and dispersed to a vastly increased audience with a speed never before imagined. The techniques of news gathering and news reporting and the audience that now receives this information is far beyond any anticipated 30 years ago when *New York Times vs. Sullivan* was decided. Media responsibility and accountability to assure an informed public capable of participating in the public debates contemplated by the First Amendment have become more critical as the media's traditional reporting of news has changed in its nature.[12]

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[12] Television programs like *Hard Copy*, *Current Affair*, and *Inside Edition*, as well as tabloid newspapers and books published virtually simultaneously with the events they document have developed entertainment as a highly effective means of reporting the news. More sensational and controversial news stories sell more newspapers and books and get the highest ratings. (*See*, "Distrustful Public Views Media as 'Them' – Not 'Us'", *Los Angeles Times*, April 1, 1993.) All of the media face a crisis as the competitive need to keep pace with the accelerated communication processes emphasizes less investigational activities and pushes toward the quickest publication of the most sensational bite of information, regardless of inconsistencies the reporter may know of. (*See*, "KCBS Apologizes for Erroneous Story on Simpson Prosecutor; Media: Station Retracts Suggestion that Clark went to Estate Before Search Warrant was Served. Ethical Issues Beyond Accuracy are Raised," *Los Angeles Times*, July 16, 1994).

In an historic sense this Court is being called upon once again to assure the protection of basic rights - both First Amendment and individual reputation rights - as the technological and social context in which we live changes. This case addresses a specific issue which becomes even more significant as communications technology becomes more developed and powerful: when should the media have a responsibility to inquire of other known and accessible sources where the reporter has inconsistent information on a subject that is to be published.

The rapid dissemination of facts coupled with the new cultural context in which news resides have resulted in the very real danger that the search for the truth will be abandoned and individual reputations devastated in an effort to publish first and capture the interest of the public with the most sensational story.[13] In this context, it is not surprising that more than at anytime since *Sullivan* there has been a public outcry for greater control and guidance regarding reporting standards and accountability.

The actual malice analysis, specifically the "purposeful avoidance of the truth" doctrine and the use of the "obvious reason to doubt" test as set forth by this Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) and followed and explained by the Ninth Circuit in *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 89 (9th Cir. 1992), must be clarified in order to clearly establish an area of media accountability in this unprecedented era of misleading and reckless reporting. Such a clarification of the law would benefit both the public and the press, by protecting the former from potential damage to reputation and by giving the latter clear

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[13] *See*, "Simpson case reports called 'outrageous' ", *USA Today*, September 23, 1994 - where Los Angeles Superior Court Judge, Lance Ito, lashed out at what a Los Angeles television station reported was blood evidence, stating: "I'm so saturated by the irresponsibility of the media . . . I'm almost numb to it." *See also*, "Judge Assails News Report on Simpson," *The New York Times*, September 23, 1994 - quoting Judge Lance Ito regarding the same inaccurate report by the news media: "It causes me to wonder about professionalism and ethics" among news organizations.

guidelines which all journalists must follow in their preparation of the news. As stated by this Court in *Harte-Hanks*, "uncertainty as to the scope of the constitutional protection [provided by the actual malice standard] can only dissuade protected speech — the more elusive the standard, the less protection it affords." *Harte-Hanks*, 491 U.S. 657, 686 (1989).

Less than a year after *Sullivan*, in a decision by Justice Brennan, the author of the *Sullivan* opinion, this Court, in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), unambiguously proclaimed that the calculated falsehood, the knowingly false statement, is not entitled to constitutional protection:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.

Similarly, statements made where the reporter has inconsistent information and avoids inquiring of other known sources with personal knowledge of the subject do not come within the First Amendment protection of *Sullivan* and its progeny. In *Harte-Hanks Communications, Inc. v. Connaughton*, this Court held that

> [a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.

491 U.S. at 692 (citation omitted.)[14]

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[14] The appropriateness of extending a duty to investigate to other known sources where the reporter has inconsistent information had been recognized in a variety of decisions by state courts and lower federal courts before this Court articulated the purposeful avoidance doctrine. *See e.g., Sharon v. Time, Inc.*, 599 F. Supp. 538, 584-85 (S.D.N.Y. 1984); *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 224 S.E.2d 132 (1976); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319 (Colo. 1981), citing *Alioto v. Cowles Publishing Communications, Inc.*, 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666, 670-71 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983).

The Courts below and the bar need guidance from this Court as to the necessary elements for establishing the purposeful avoidance of the truth. The current conflict on this issue is well illustrated in comparing the decision of the New York Court of Appeals in the instant action with this Court's decision in *Harte-Hanks* and the 1992 decision of the Ninth Circuit in *Masson*.

In affirming the New York Appellate Division's grant of summary judgment, the Court of Appeals effectively interpreted *Harte-Hanks* to mean that in order to establish reckless disregard, the threshold level of "reason to doubt" necessary to trigger a reporter's responsibility to take reasonable steps to dispel "doubt," must be the equivalent of "serious doubt" ultimately necessary to conclude that the reporter's state of mind reflected reckless disregard. This misplaced extreme degree of awareness of doubt required by the New York Court of Appeals before triggering analysis of a reporter's responsibility to dispel "doubt" is evidenced in the following language from the Court's decision:

> There is no showing that defendant wrote the statement with "reckless disregard for [the] truth" (*see, St. Amant v. Thompson*, 390 U.S. 727, 731; *New York Times Co. v. Sullivan*, 376 U.S. at 279-280, *supra*). Any such finding must be supported by "sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of his publication" (*Id.*). Plaintiff has failed to set forth such evidence. Neither plaintiff's alleged "conflict" between Hoglander's recollection of plaintiff's August 20 sentiments and Freund's of his statements, nor any other evidence before us can be assessed to give rise to *such concerns* by defendant. *Defendant was thus not required to interview* either the alleged maker of the statement or all the persons allegedly present at the meeting (*see, Harte-Hanks v. Communications v. Connaughton*, 491 U.S. 657, 692, *supra* [failure to investigate, alone, will not support a finding of actual malice]). (Emphasis added).

The New York Court of Appeals misunderstood the meaning and use of "obvious reason to doubt" in the two-part test

involved in purposeful avoidance of the truth analysis. When the Court states that no evidence can be assessed to "give rise to such concerns by defendant," clearly it equates such "concerns" with "serious doubt" referred to immediately before in the decision. This misplaced high degree of doubt the New York Court of Appeals requires as a threshold level before triggering the reporter's responsibility to further investigate the veracity of the informant or the truth of the report effectively turns the *two* part purposeful avoidance analysis, which establishes reckless disregard by inference, into the *one* part analysis that was the sole test of reckless disregard prior to this Court's recognition of the purposeful avoidance doctrine.

In contrast, in *Masson v. New York Magazine, Inc.*, 960 F.2d 896 (9th Cir. 1992), an opinion in which the Ninth Circuit carefully explained and applied the actual malice analysis of *Harte-Hanks*, the Court held that a libel plaintiff may establish clear and convincing evidence that the publisher of a defamatory statement acted with reckless disregard in either of two ways:

> First, he can establish the publisher's state of mind by evidence that the publisher "actually had a high degree of awareness of probable falsity." *Second, plaintiff may show that the circumstances surrounding publication gave the publisher "obvious reasons to doubt the veracity of the [author] of the accuracy of [facts and quotations in her book or article]," and that the publisher failed to take reasonable steps to dispel those doubts.*
>
> *As we interpret Harte-Hanks, these two standards provide different paths to the same conclusion.* Where the jury has proof that a publisher "actually had a high degree of awareness of probable falsity," that alone will establish that it "in fact entertained serious doubts as to the truth of [its] publication." *Where such direct proof is missing, the jury may nevertheless infer that the publisher was aware of the falsity if it finds that there were "obvious reasons to doubt" the accuracy of the story, and that the defendant did not act reasonably in dispelling those doubts.*

960 F.2d at 900. (Emphasis added). In support of its analysis, the Ninth Circuit cited this Court's statement that "the purposeful avoidance of the truth is in a different category," from *Harte-Hanks* and applying that stated:

> [W]here the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place.

Moreover, the *Masson* Court recognized a distinctive and lower level of doubt inherent in the "obvious reason to doubt" test that would require a reporter to act reasonably to dispel such doubt. In *Masson*, the Court states:

> "While the protestations of a source will not standing alone, support an inference that the publisher 'entertained serious doubts' about, ***or even 'had obvious reason to doubt,'*** the accuracy of the quotations . . . Masson's objection was raised during the fact checking process initiated by the New Yorker as part of its maintaining accuracy of its stories." *Id.* (Emphasis added).

This lower threshold level of "doubt" in the "obvious reason to doubt" analysis is necessarily implicit in the purposeful avoidance doctrine itself since that doctrine has two parts: 1) Obvious reason to doubt, and 2) A reporter's responsibility to take reasonable steps to dispel those doubts. These *two* parts of the "purposeful avoidance" doctrine together create an inference a reporter "entertained *serious doubt*." If the "reason to doubt" the accuracy of a report or informant's veracity is analyzed to only be sufficient if it rises itself to the level of "serious doubt" before considering the failure to take reasonable steps to dispel doubt (and other circumstantial evidence of actual malice), this effectively destroys what was intended to be a two part "purposeful avoidance" analysis to establish reckless disregard.

Petitioner respectfully submits that the issues raised by the decision below require this Court's consideration in order to settle conflicting treatment of actual malice proof in regard to the purposeful avoidance of truth.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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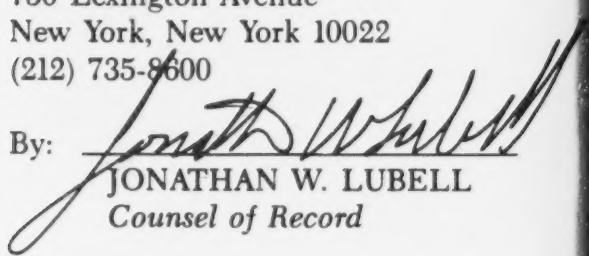
By: 
JONATHAN W. LUBELL
Counsel of Record

APPENDIX

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84 N.Y.2d 52

State of New York
Court of Appeals

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1 No. 127
Brian M. Freeman,
Appellant,
v.
Moira Johnston,
Respondent,
et al.,
Defendant.

Jonathan W. Lubell, for appellant.
Slade R. Metcalf, for respondent.

OPINION OF THE COURT

SMITH, Judge.

In this action for defamation, the question is whether summary judgment was correctly granted to defendant dismissing the complaint. We agree with the Appellate Division that the evidence was insufficient to allow a rational fact finder to find actual malice by clear and convincing evidence.

This controversy arises from the publication of defendant Moira Johnston's book, "Takeover: —The New Wall Street Warriors: The Men, The Money, The Impact," chronicling recent contests in the world of corporate takeovers. Plaintiff Brian Freeman, who brought this action for defamation,[1] was a financial advisor to the International Association of Machinists (IAM),

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[1] Although plaintiff Brian M. Freeman & Co. Inc. and defendant the Hearst Corporation doing business as Arbor House Publishing Co., Inc. were included as parties at Supreme Court, this appeal involves only plaintiff Brian Freeman and defendant Moira Johnston.

one of two unions[2] which took part in negotiations over the future of Trans World Airlines (TWA). The negotiations involved a battle between Carl Icahn and Frank Lorenzo for control of TWA. In characterizing a critical meeting of the TWA Board of Directors held on August 20, 1985, involving the Icahn-Lorenzo struggle, defendant, in her book, made the following statement concerning plaintiff:

> "Brian Freeman, the lawyer who represented the machinists, compounded the threats of strike, warning that being sold into bondage to Lorenzo would provoke night time trashing of airplanes and other sabotage."

Although plaintiff was admittedly present at that meeting, he denied having made the statement, claiming that it was false and defamatory and conveyed that he "threatened, condoned and encouraged the likely commission of acts of physical sabotage and other illegal actions" by his clients.

Also present at the August 20 meeting were Harry Hoglander, an airline pilot, veteran TWA employee and then Chairman of the Master Executive Council of the Airline Pilots Association, and James Freund, Esq., of Skadden, Arps, Slate, Meagher & Flom, who acted as counsel to the TWA board. Hoglander, who was interviewed by Johnston, recalled that the statement accurately portrayed plaintiff's sentiment at the meeting. Plaintiff asserts, however, that Freund's memory of Freeman's statement contradicted that of Hoglander, thus giving rise to an inference Johnston should have drawn that her information needed further verification.

At Supreme Court, defendant moved for summary judgment, alleging that plaintiff failed to make a prima facie showing of defamation. Supreme Court denied the motion insofar as it was addressed to the defamation cause of action, holding that the statement at issue could not be reconciled with witness Freund's version that what Freeman said was "no big deal." Thus, that

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[2] The Airline Pilots Association was the other.

court found summary judgment as to the defamation cause of action inappropriate.[3]

The Appellate Division granted summary judgment dismissing the defamation claim, with one dissent, noting that the statement attributed to Freeman "is a privileged description of the attitudes of the union membership he represented, and not a blanket endorsement of illegal activity by a lawyer, as plaintiff urges" (192 A.D.2d 250, 252, 601 N.Y.S.2d 606). The Appellate Division granted plaintiff's motion for leave to appeal to this Court. We now affirm.

Here, plaintiff claims that the statement in question was published with actual malice and that it is reasonably susceptible to a defamatory meaning. Defendant counters that the Appellate Division properly dismissed plaintiff's claim because no evidence of constitutional malice exists.

A public official may not recover damages for defamation unless the offical proves that the offending false statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (*see, New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686; *Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 474, 605 N.Y.S.2d 218, 626 N.Ed.2d 34). In *Curtis Publ. Co. v. Butts* (388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, *reh'g denied* 389 U.S. 889, 88 S.Ct. 11, 19 L.Ed.2d 197, the United States Supreme Court extended this standard to all "public figures" and it has since been consistently applied to such (*see, Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562; *Mahoney v. Adirondack Publ. Co.*, 71 N.Y.2d 31, 39, 528 N.Y.S.2d 480, 517 N.E.2d 1365)[4].

In a defamation action, plaintiff has the burden of showing actual malice (*see, Mahoney v. Adirondack Publ. Co.*, 71 N.Y.2d

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[3] Supreme Court granted summary judgment dismissing the third cause of action, which alleged a false light invasion of privacy claim, and the Appellate Division affirmed as to that cause of action. Plaintiff does not here claim error with respect to that dismissal.

[4] Plaintiff does not dispute that, for present purposes, he is a public figure.

31, 39, 523 N.Y.S.2d 480, 517 N.E.2d 1365, *supra*) including " 'the burden of showing the falsity of factual assertions' " (*see, Prozeralik v. Capital Cities Communications*, 82 N.Y.2d, at 473, 605 N.Y.S.2d 218, 626 N.E.2d 34, *supra, citing Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 245, 566 N.Y.S.2d 906, 567 N.E.2d 1270, *cert denied* 500 U.S. 954, 111 S.Ct. 2261, 114 L.Ed.2d 718). On appeal in these cases, courts have a "constitutional duty to 'exercise independent judgment and determine whether the record establishes actual malice with convincing clarity' " (*Harte-Hanks Communications v. Connaughton*, 491 U.S. at 659, 109 S.Ct. at 2681, *supra, citing Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 514, 104 S.Ct. 1949, 1967, 80 L.Ed.2d 502; *Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 474, 605 N.Y.S.2d 218, 626 N.E.2d 34, *supra; Mahoney v. Adirondack Publ. Co.*, 71 N.Y.2d 31, 39, 523 N.Y.S.2d 480, 517 N.E.2d 1365, *supra*). The exercise of such "independent judgment" applies to this Court notwithstanding the constraints upon our factual review powers (*see, Prozeralik v. Capital Cities Communications*, 82 N.Y.2d, at 475, 605 N.Y.S.2d 218, 626 N.E.2d 34, *supra; see also, Mahoney v. Adirondack Publ. Co.*, 71 N.Y.2d at 39, 523 N.Y.S.2d 480, 517 N.E.2d 1365, *supra*). "Convincing clarity" is synonymous with the "clear and convincing" standard (*see, Anderson v. Liberty Lobby*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202; *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 511, n. 30, 104 S.Ct. 1949, 1965, n. 30, 80 L.Ed.2d 502, *supra*).

This standard of "convincing clarity" applies even on a motion for summary judgment (*Anderson v. Liberty Lobby*, 477 U.S., at 254, 106 S.Ct., at 2513, *supra*). Moreover, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party * * *. If the evidence is merely colorable * * * or is not significantly probative * * *, summary judgment may be granted" (*id.* at 249-250, 106 S.Ct. at 2510-11 [citations omitted]).

Plaintiff claims that the statement at issue was published with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false. Plaintiff argues that

here, as in *Harte-Hanks*, defendant (1) received conflicting information, (2) was advised of a witness who could confirm the probable falsity of the accuser's charges, and (3) failed to make any effort to interview that witness. The alleged conflict, according to plaintiff, is between Hoglander's account of plaintiff's statement and Freund's recollection of it. Hoglander, in an interview with defendant, remarked that during the meeting, plaintiff discussed the TWA machinists' animosity toward Lorenzo, that they were emotionally charged, and stated that "the [machinists] would probably trash the airpl[anes] on their overnight layovers." The statement by Freund that plaintiff considers in conflict with Hoglander's view is the following:

> "Interviewer: 'Did Brian Freeman take a position about what the machinists might. . .'
>
> "Freund: 'Yea, yea but Brian was more cautious I think as a lawyer, I think he's a lawyer, maybe he's not, an investment banker but I think he is a little more cautious. I can't remember exactly what Brian said. But it was no big deal.' "

We reject plaintiff's contention. Plaintiff's analysis is flawed because no clear and convincing evidence exists indicating that Hoglander's view of plaintiff's statement at the meeting was contradicted by Freund's statement, the latter statement appearing equivocal at best (*see, Mahoney v. Adirondack Publ. Co.*, 71 N.Y.2d 31, 40, 523 N.Y.S.2d 480, 517 N.E.2d 1365, *supra*). Perhaps most telling is Freund's admission that he could not "remember exactly what [plaintiff] said." Moreover, Freund's opinion that it was "no big deal" may refer to any number of considerations: that Hoglander expressed the same sentiment as plaintiff and therefore had lessened the impact of plaintiff's statement; that Freund was genuinely unimpressed by plaintiff; or that plaintiff's words, in Freund's view, did not sway the Board in either direction. Given these different possible interpretations, no rational finder of fact could, in this case, find actual malice by clear and convincing evidence. The following statement from the Supreme Court's decision in *Anderson v. Liberty Lobby*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, *supra* is applicable here:

> "Just as the 'convincing clarity' requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence."

There is also no showing that defendant wrote the statement with "reckless disregard for [the] truth" (*see, St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262; *New York Times Co. v. Sullivan*, 376 U.S., at 279-280, 84 S.Ct., at 725-726, *supra*). Any such finding must be supported by "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" (*St. Amant v. Thompson*, 390 U.S., at 731, 88 S.Ct., at 1325). Plaintiff has failed to set forth such evidence here. Neither plaintiff's alleged "conflict" between Hoglander's recollection of plaintiff's August 20 sentiments and Freund's view of his statements nor any other evidence before us can be assessed to give rise to such concerns by defendant. Defendant was thus not required to interview either the alleged maker of the statement or all of the persons allegedly present at the meeting (*see, Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 692, 109 S.Ct. 2678, 2698, 105 L.Ed.2d 562, *supra* [failure to investigate, alone, will not support a finding of actual malice]).

Thus, on the evidence considered in this action, plaintiff has failed to show evidence of defendant's "actual malice with convincing clarity" (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, *supra*). Plaintiff demonstrated neither falsity (*see, New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686, *supra*) nor a reckless disregard for the truth (*id.*).

Finally, we agree with the Appellate Division that the statement, in the context in which it was allegedly made, is not susceptible to the defamatory meaning that plaintiff supported illegal acts of sabotage if the negotiation was not concluded as he wished.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

KAYE, C.J., and SIMONS, TITONE, BELLACOSA, LEVINE and CIPARICK, JJ., concur.

Order affirmed, with costs.

PUBLISHED
192 A.D.2d 250

SUPREME COURT, APPELLATE DIVISION

First Department, Aug. 19, 1993

Brian M. Freeman,
Plaintiff-Respondent-Appellant,

—against—

Moira Johnston,
Defendant-Appellant-Respondent,

—and— 49506

The Hearst Corporation, d/b/a
Arbor House Publishing Co., Inc.,
Defendant.

Cross-appeals having been taken from an order of the Supreme Court, New York County (Diane A. Lebedeff, J.), entered on or about March 19, 1993, insofar as it denied defendant-appellant's motion for summary judgment dismissing the cause of action for defamation and granted her motion for summary judgment dismissing the cause of action for false light invasion of privacy.

Jonathan W. Lubell and Arlene R. Smoler, of counsel (Morrison Cohen Singer & Weinstein, attorneys) for plaintiff-respondent-appellant,

Slade R. Metcalf, of counsel (Mark H. Jackson, with him on the brief, Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, attorneys) for defendant-appellant-respondent.

Before WALLACH, J.P., and KUPFERMAN, ROSS and KASSAL, JJ.

KUPFERMAN, Justice.

Defendant Johnston is the author of "Takeover: The New Wall Street Warriors—The Men, The Money, The Impact" ("*Takeover*"). One of the corporate takeover battles described in the book is the struggle for control of Trans World Airlines ("TWA") between Carl Icahn and Frank Lorenzo, ultimately won by Icahn. In the age of Milken & Boesky, such struggles are a staple in the book market. See, among others, "Barbarians at the Gate", the book and the made-for-television movie, detailing the struggle for RJR-Nabisco.

Plaintiff Freeman, a lawyer, acted as financial advisor for the International Association of Machinists (IAM) one of the two labor unions (the other being the Airline Pilots Association [ALPA]), which took part in the negotiations over TWA's future ownership.

Freeman was concededly present for part of the meeting in August of 1985 of the TWA Board of Directors at which control was determined.

In describing events at the meeting, *Takeover* contains the following statement:

> Brian Freeman, the lawyer who represented the machinists, compounded the threats of strike, warning that being sold into bondage to Lorenzo would provoke night time trashing of airplanes and other sabotage.

It is contended that the statement was false and "conveyed the defamatory meanings that plaintiff threatened, condoned and encouraged his clients' likely commission of acts of physical sabotage and other illegal conduct."

Freeman has a distinguished background and record in tax law and has worked in government and industry in the Washington, D.C. area, although he is now based in New Jersey. He is conceded to be a public figure.

The defendant, Johnston, is a writer who specializes in exhaustively researching books about business affairs and the transportation industry in particular.

The standard for defamation here is the constitutional malice standard. (*New York Times Co. v Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; *Curtis Publishing Co. v Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, *reh'g denied* 389 U.S. 889, 88 S.Ct. 11, 19 L.Ed.2d. 197).

It is alleged, therefore, that Johnston acted in a grossly irresponsible manner with reckless disregard for the truth.

James Freund, Esq., of Skadden, Arps, Slate, Meagher & Flom, acted as Counsel to the TWA Board and was present at the meeting where Freeman and Captain Harry Hoglander, an airline pilot and longtime TWA employee and the then Chairman of the Master Executive Council of the Airline Pilots Association, spoke to the Board.

Johnston's two principal sources for the reference to Freeman in the book are Messrs. Hoglander and Freund.

Naturally, there is a dispute as to the meaning of what was said at the meeting. Based upon Hoglander's version, plaintiff's utterance of the statement itself is clearly substantiated. Freund is more conservative in his assessment of its meaning, saying that Freeman's analysis for the Board, compared to Hoglander's, was "no big deal". Others who might have given a different version were not interviewed.

While it is problematical whether the machinists would have acted as stated, the only issue for us is whether Freeman adopted such predicted sabotage and used it as a threat.

Not only is there no constitutional malice, the author having properly researched and, at most, come up with a possibly mistaken inference, but an objective consideration of the function of Freeman at the meeting leads to the conclusion that the statement attributed to Freeman is a privileged description of the attitudes of the union membership he represented, and not a blanket endorsement of illegal activity by a lawyer, as plaintiff urges.

Lorenzo was concededly anathema to the union. Even today, years later, he is viewed with suspicion by them (NY Times May 27, 1993, "Old Labor Foes Dog Lorenzo's Return to the Skies", Section D, p. 8. col. 1).

A lawyer must consider the clients' requirements and needs. (*See*, Code of Professional Responsibility, Canon 7 and Ethical Consideration, EC 7-8).

Bearing this in mind, we cannot conclude that there was a "high degree of awareness of . . . probable falsity" of the statement in the publication (*see*, *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125). Nor, can we say that the defendant entertained, or even should have entertained, serious doubts as to the truth of the statement (*St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262. *See generally*, Driscoll & Youm, "Harte-Hanks Communications v. Connaughton: *The U.S. Supreme Court's Application of the Actual Malice Rule*", *Communications and the Law*, Vol. 14, No. 1, p. 57, 62 [March 1993]).

We, of course, agree with the determination dismissing the third cause of action for false light invasion of privacy inasmuch as the motion court correctly concluded that New York law applies to such claim and this State does not recognize such a tort (*see*, *Arrington v. N.Y. Times*, 55 N.Y.2d 433, 442, 449 N.Y.S.2d 941, 434 N.E.2d 1319).

Accordingly, the order of the Supreme Court, New York County (Diane S. Lebedeff, J.), entered March 19, 1993, insofar as it denied defendant-appellant's motion for summary judgment dismissing the first cause of action for defamation and granted her motion for summary judgment dismissing the third cause of action for false light invasion of privacy, should be modified, on the law, to the extent of granting defendant-appellant's motion for summary judgment in its entirety and dismissing the first cause of action for defamation and, as so modified, the order should otherwise be affirmed, without costs.

Order, Supreme Court, New York County (Diane A. Lebedeff, J.), entered on or about March 19, 1993, modified, on the law, to the extent of granting defendant-appellant's motion for summary judgment in its entirety and dismissing the first cause of action for defamation and, as so modified, affirmed, without costs.

All concur except ROSS, J. who dissents in an Opinion.

ROSS, Justice (dissenting).

I dissent and would affirm. Questions of material fact exist, based upon which a jury could find that defendant-appellant Johnston exhibited actual malice in writing the alleged defamatory statement (*See, Dally v. Orange County Publs.*, 117 A.D.2d 577, 578-579, 497 N.Y.S.2d 947). While Johnston's reliance on two first-hand sources was appropriate to conclude that plaintiff had conveyed to the TWA Board of Directors the possibility that the union machinists would engage in sabotage, the sources' statements do not appear to support the conclusion that plaintiff had expressed his *condonation* of such behavior. Since Johnston's phrasing of the reference to plaintiff in her book is susceptible of the latter defamatory interpretation, a jury could find that she had exhibited a reckless disregard for the truth in suggesting to her readers, without foundation, that plaintiff had condoned the threat of criminal acts on the part of the union members.

Further, the trial court correctly concluded that the substantive law of New York applies to plaintiff's claim for false light invasion of privacy. Since this State does not recognize such a tort, the third cause of action was properly dismissed.

SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTY

PART 8

PRESENT: Hon. **DIANE A. LEBEDEFF** *Justice.*

BRIAN M. FREEMAN,	INDEX NUMBER 23229/87
— against —	MOTION DATE FEB 04 1993
THE HEARST CORPORATION, et al	MOTION SEQ. NO. 003
	CAL. NO. 5

The following papers numbered 1 to ____ read on this motion for summary judgment

Notice of Motion/Order to Show Cause - Affidavits - Exhibits
Answering Affidavits - Exhibits
Replying Affidavits
Papers Numbered 1-7

Upon the foregoing papers it is ordered that this is decided in accordance with accompanying memorandum decision.

Dated 3/5/93

/s/DAL
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

----------x

BRIAN M. FREEMAN and BRIAN M. FREEMAN & CO., INC.,

Plaintiffs,

— against — Index No. 23229/87

THE HEARST CORPORATION, d/b/a ARBOR HOUSE PUBLISHING CO., INC., and MOIRA JOHNSTON,

Defendants.

----------x

DIANE A. LEBEDEFF, J.:

Before the court is the defendants' motion for summary judgment in this defamation action. Summary judgment is sought upon the basis that, as to the first cause of action, plaintiff cannot make the requisite showing to support a defamation claim and, as to the third, that a false light invasion of privacy claim is not legally viable under the applicable law.

The case rests upon a single statement in a book entitled *Takeover: The New Wall Street Warriors*, authored by the individual defendant and published by the corporate defendant. In a section regarding an attempted takeover of Transworld Airlines ("TWA"), the following statement was made:

> "Brian Freeman, the lawyer who represented the machinists, compounded the threats of strike, warning that being sold into bondage to Lorenzo would provoke nighttime trashing of airplanes and other sabotage."

The plaintiff, a lawyer, claims the statement is false and that he would not have uttered words supporting illegal labor activity. It has already been determined that the statement was "reasonably susceptible of a defamatory connotation" (McCooe, J., decision and order of December 18, 1987), and the claim of the corporate plaintiff was dismissed (McCooe, J., supplementary decision of August 5, 1988).

Voluminous material, both legal and factual, has been placed before the court. At oral argument, it was explicitly conceded that plaintiff falls within the public figure category, which eliminates one controversy. Further, there is no dispute that the topic of the book, corporate takeovers in the 1980's, was a matter of legitimate public concern. Additionally, to lay aside other possible issues of law, the statement does not pose issues relating to opinions (compare *Gross v. New York Times Co.*, 180 A.D.2d 308 (1st Dept. 1992]) and there is no contention that the defendants bore actual malice toward plaintiff in the common law sense of spite or ill will (*Stillman v. Ford*, 22 N.Y.2d 48, 53 [1968], and *Shapiro v. Health Insurance Plan of Greater New York*, 7 N.Y.2d 56, 61 [1959]).

As to the publisher, it cannot be refuted that the defamation claim cannot stand. There is no suggestion that the publisher had any " 'substantial reason' to doubt the accuracy of the material or the trustworthiness of its [established] author" and it performed its own review prior to publication (*Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 [1989]). As to the publisher, there is no basis to find "gross irresponsibility" (*McGill v. Parker*, 179 A.D.2d 98, 99 [1st Dept. 1992]; *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 345 [1984]).

As to consideration of claims against the author, numerous phrases appear in defamation law as courts attempt to reach a proper standard to be used for the concept of the "constitutional malice" which must underlie a defamation claim in this context. In this instance, the court finds the most readily applicable is the focus upon whether the author "acted in a grossly irresponsible manner without due consideration for the standards of

information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 [1975], quoted in *Weiner v. Doubleday & Co., supra*).

These papers do not address the issue of the proper information gathering standards to be applied on these facts. The individual defendant is reported to have made a statement regarding physical damage to presumably expensive equipment and resultant havoc with airplane schedules, which, for the sake of argument, the court assumes subsumes an implicit forecast of a number of felonies. The author had a clear source for her description, the president of the TWA pilots' union. At the same time, the other information before the author was the remark of the counsel to TWA that the subject individual was someone "more cautious as a lawyer, I think he's a lawyer, an investment banker" and that whatever the speaker said "it was no big deal" (Lubell Aff., Exhibit 3, pp. 2498-2499).

Unresolved is whether, in such an instance, a responsible information gatherer would proceed to an interview of the person or to interview others present. Plaintiff makes a strong showing that the statement made was false, which may well convince the trier of fact, and, moreover, establishes that the author could have interviewed numerous other persons present, including plaintiff, who would have given contrary accounts. The author's counsel invites the court to determine that no more research should be required. New York courts traditionally undertake a more sensitive inquiry, based upon a full consideration of the nature of the work and the available information and constraints. It must be noted that the book's acknowledgements contain the following statement:

> ". . . I have explored the subject from many perspectives and through innumerable sources, the most important being the dozens of people who appear in this book. This is not a piece of psychohistory. Every word, thought and feeling is drawn from face-to-face,

> in-depth interviews with the principles, as well as from rigorous research into the paper blizzard of documentation that has accompanied the take-over phenomenon." (*Takeover*, p. ix.)

The book is not a "pastiche of statements by interviewees," as was the book at issue in *Weiner v. Doubleday & Co.*, *supra*, 74 N.Y.2d at 593, but objective and definitive.

Certainly, there is authority for the position that, in some instances, further inquiry by an author might be required. For example, in *Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408 (6th Cir. 1991), the court held that "if the author's own sources indicate that what [the author] was writing might not be true, each source must be examined to determine whether it was reliable and whether it indicated that more research was required . . . ." (*Id.* at 411). Here there were no attempts to interview a critical witness, which would defeat, as a matter of law, "purposeful avoidance of the truth" claim (see, *Newton v. National Broadcasting Company, Inc.*, 930 F.2d 662, 686 [9th Cir. 1990]). Nor, given that there were only two conflicting sources, can it be said that the version of events adopted was supported by such a large number of people that according little weight to a single varying account could not be a "purposeful avoidance of the truth" (*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 [1989]; see also, *Bressler v. Fortune Magazine*, 971 F.2d 1226 [6th Cir. 1992], reports consistent).

Based upon the material before the court, the court determines that summary judgment cannot be reached here. The general statements of the law offer little other which is directly helpful on the issue of the standard of information gathering to be utilized in relation to a serious work of non-fiction.

In closing this area of the discussion, the court acknowledges that summary judgment is often granted to a defendant upon a libel claim brought by a public figure centering upon a matter of public concern. The particular statement at issue casts the attorney-plaintiff into the public position of reporting the

deliberate plan of his client to pursue felonies, with the attorney's apparent acquiescence. To this judge's ear, that public posture cannot be reconciled with the "not a big deal" assessment made by the only other source commenting upon plaintiff's behavior, with that source being a sophisticated attorney who had reached the prominent position of counsel to TWA and partner in Skadden Arps. On the issue of whether this comment should have alerted the author to possible falsity, it should not be ignored that the book is a foray into an area fraught with legalistic regulation, including regulations based upon ethical considerations and public policy. While the comment might not have alerted many lay-persons, this author dealt with sophisticated and complex legal maneuvering in 1985. The issue was not foreign to public debate for the events were not so long after the public debate over legal ethics involved in the disbarrment of former President Nixon and former Attorney General Mitchell. In the special context of this book, the court finds that plaintiff has raised a sufficiently "clear and convincing" challenge under the "reckless disregard" and "responsible information gathering" standards to defeat summary judgment and to show entitlement to a day in court.

The final question concerns the last cause of action which appears to sound in false light invasion of privacy, a cause of action which both sides acknowledge is not recognized in New York. The plaintiff invites the court to find the cause of action is viable under either New Jersey or Washington, D.C., law because the law of either jurisdiction should be applied under a conflict of law analysis. The issue was raised before Justice McCooe, who declined to reach the issue until the facts were further explored.

Based upon a full consideration of the various factors urged by both parties, the court determines that New York law is applicable and that this cause of action must fall. The individual plaintiff resided in New Jersey, but there is no argument to support damage to his professional reputation in New Jersey until his firm relocated to New Jersey in 1991, which renders the basis

for using New Jersey tenuous. As to Washington, D.C., none of the actual events at issue took place there.

As to New York, the relationship of New York is obvious for the book concerns the "new Wall Street warriors," the meeting at issue was a New York meeting, and the book was reviewed internally and published by a New York publisher. The logical nexus is inescapable. Moreover, the court gives some weight to the factor that an author and publisher must review a work under some libel standard and, where there is a New York meeting with numerous participants about a New York subject, unless one is to call upon an unwieldy review of statements under the standards of the home jurisdiction of the various participants, as well as that of any related .pa entity, a more orderly conflict of law approach should rest upon a review under New York law.

In many instances, a court is confronted with an article about one person firmly located in one state and the state of residence test is obviously preferable. This case, after discovery, shows no such features. Accordingly, under New York law, the third cause of action is dismissed.

This decision constitutes the order of the court.

Dated: March 5, 1993

/s/DAL

J.S.C.

No. 94-566

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRIAN M. FREEMAN,

Petitioner,

—v.—

MOIRA JOHNSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Moira Johnston ("Johnston") files this brief in opposition to the petition of petitioner Brian M. Freeman ("Freeman") for a writ of certiorari. The decision below by the New York State Court of Appeals does not in any way conflict with the decision of another state court of last resort or of a United States Court of Appeals. Nor did the court below decide an important, yet unsettled, question of federal law or decide a federal question which conflicts with decisions of this Court. Freeman unsuccessfully attempts in his Petition to create some kind of new constitutional test based on a factual premise which was decided adversely to him by a unanimous New York State Court of Appeals and by three of our four judges at the New York

intermediate appellate court. There is no conceivable basis for this Court to redefine the "actual malice", constitutional standard as interpreted by this Court in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) and in Masson v. New Yorker Magazine, Inc., ___ U.S. ___, 111 S.Ct. 2419 (1991). The petition for a writ of certiorari should accordingly be denied.

STATEMENT

The New York Court of Appeals has disposed of the instant libel suit on the well-recognized basis of the absence of constitutional malice as a matter of law. Freeman v. Johnston, 84 N.Y.2d 52, 57, 614 N.Y.S.2d 377, 379 (1994). Alternatively, the court below found, on the common law, non-constitutional ground, that the statement complained of by Freeman is not defamatory of him. (Id.)

This Court, pursuant to its own Rule 10, will grant a petition for a writ of certiorari "only when there are special and important reasons therefore." (Emphasis supplied.) See Rice v. Sioux City Memorial Park Cemetery, Inc., 348 U.S. 70, 74 (1955) ("'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.") In particular, a petition may be granted only when a state court of last resort has decided a federal question in a way that conflicts either with a decision of another state court of last resort or a United States Court of Appeals. (Rule 10.1(b)). A petition may also be granted when a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with

applicable decisions of this Court." (Rule 10.1(c)).

Freeman seeks to have this Court consider this case on the grounds that somehow the ruling by the New York State Court of Appeals misinterpreted or conflicted with a so-called "doctrine" of "purposeful avoidance of the truth" as fleetingly referred to in the Harte-Hanks Communications case and in Masson v. New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992). This theory has no basis in fact or law.

The New York Court of Appeals followed the teachings of this Court in determining that Johnston, a noted and respected book author, did not entertain serious doubts as to the truth of what she was told by her direct source Captain Harry Hoglander ("Hoglander"), nor did she ignore or purposely avoid the truth of

what she was about to publish. The Court determined that the statements by James Freund ("Freund") were not sufficiently decisive or clear, so that they obliged Johnston to speak to additional sources as to the truth of what she was about to write and have published.

Freeman would have this Court adopt a standard different from all the cases announced by this court in the wake of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) by stating that if there is any possible conflict between information obtained by two sources, the journalist is obliged to seek out other, additional sources for verification. That is not and never has been the standard of "actual malice," in the constitutional sense, as adopted by this Court. Freeman would, in effect, have this Court adopt a negligence standard when public figures sue book

publishers concerning matters of public interest. This Court should not consider such a sea-change in the constitutionalization of libel law as interpreted over the past thirty years, particularly on the facts of this case.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

A fair reading of Freeman's Petition discloses that, like so many unsuccessful litigants, he merely wants to have another appellate court hear and consider his argument that he has sufficient evidence of "actual malice" in the constitutional sense (hereinafter characterized as "constitutional malice") to proceed to a jury. His confusing and often inarticulate attempt to formulate some federal, constitutional question (which then may conflict with this Court's opinion in Harte-Hanks) is unavailing. It is clear from the precise, articulate wording of a unanimous seven-judge court below that the scope and contours of the constitutional malice standard were fully understood and properly applied by that court.

A. Misstatement of the Record Below

The Petition's recitation of the factual record below surprisingly omits certain of Johnston's sources and certain steps taken by her to verify the statement about Freeman. Petitioner instead focuses on an isolated statement from Freund and a parenthetical comment from Johnston's research assistant that, according to petitioner, should have created serious doubts in Johnston's mind so that she was obligated to seek out additional sources for verification. (Petition, pp. 4-9).

In point of fact, Johnston spoke on several occasions to Hoglander who gave Johnston almost the exact statement about Freeman as appeared in the book Takeover: The New Wall Street Warriors: The Men, The Money, The Impact (the "Book"). (A-113).[1]

---

[1] References preceded by "A-" are to Plaintiff-Appellant's Appendix in the Court of Appeals.

Hoglander told Johnston that Freeman warned the TWA Board that selling TWA to Frank Lorenzo "would provoke night time trashing of airplanes and other sabotage" by the machinists union which Freeman represented as a lawyer. (A-93). That statement had also been published in the pilots' union newsletter, prior to Johnston writing the Book. Hoglander was not some hearsay, second-hand source; he was an eyewitness, first-hand source to Freeman's statement at the Board meeting. (A-122-23).

Petitioner conveniently omits in his Petition the facts that Hoglander's statement had been previously published in the pilot's newsletter and that Johnston showed the completed manuscript to Freund - several months after Freund made the so-called contradictory statements. (A-127). Not only did Freund read the manuscript,

but he suggested changes to the exact same paragraph of which Freeman complains. (A-193). Freund did not suggest a single alteration to the sentence of which Freeman complains. (Id.) This approval by Freund of the sentence concerning Freeman is fully consistent with the New York State Court of Appeals' view of Freund's allegedly contradictory statement made in the interview several months before:

> We reject plaintiff's contention. Plaintiff's analysis is flawed because no clear and convincing evidence exists indicating that Hoglander's view of plaintiff's statement of the meeting was contradicted by Freund's statement, the latter statement appearing equivocal at best (See, Mahoney v. Adirondack Publ. Co., 71 N.Y.2d 31, 40, 523 N.Y.S.2d 480, 517 N.E.2d 1365, supra). Perhaps most telling is Freund's admission that he could not

> "remember exactly what [plaintiff] said." Moreover, Freund's opinion that it was "no big deal" may refer to any number of considerations: that Hoglander expressed the same sentiment as plaintiff and therefore had lessened the impact of plaintiff's statement; that Freund was genuinely unimpressed by plaintiff; or that plaintiff's words, in Freund's view, did not sway the Board in either direction. Given these different possible interpretations, no rational finder of fact could, in this case, find actual malice by clear and convincing evidence.

Freeman, 84 N.Y.2d at 57-58; 614 N.Y.S.2d at 379-380 (emphasis supplied).

Despite the view of all seven judges in the court below that the statement was "equivocal at best," Petitioner surprisingly states that "Freund unambiguously disputed Hoglander's

characterization of Freeman's remarks at the August 20th board meeting." (Petition, p. 5).

Petitioner's entire argument here is premised on the Court's ignoring the conclusion by the unanimous court below that Freund's comment was "equivocal", vague, and ambiguous. Because without a definitive, clear statement by Freund to Johnston that Hoglander's recollection of Freeman's statement at the Board meeting was incorrect, then by any constitutional measure, Johnston could not possibly have recklessly disregarded the truth of Hoglander's oral and published version of what happened at the Board meeting.

This Court should not, and under its Rules cannot, be second-guessing state appellate courts on interpretations of factual records, unless the results of those state court rulings adversely

implicate constitutional rights. See N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498, 502-503 (1951). Here, Freeman has no constitutional right to continue a libel suit, a creature of state law, after a state court of last resort had found that the factual record could not support a finding by a jury of reckless disregard of the truth by clear and convincing evidence. The court below held that Freeman "demonstrates neither falsity . . . nor a reckless disregard for the truth." Freeman, 84 N.Y.2d at 58, 614 N.Y.S.2d at 380. In addition, the New York Court of Appeals "agree[d] with the Appellate Division that the statement, in the context in which it was allegedly made, is not susceptible to the defamatory meaning that plaintiff supported illegal acts of sabotage if the negotiation was not concluded as he wished." Freeman, 84

N.Y.2d at 59; 614 N.Y.S.2d at 380. This holding represents an alternative, non-constitutional ground for dismissal, which permits the Court to avoid addressing the arguable constitutional basis for this Petition.

B. The Court Below Properly Construed The Constitutional Malice Standard

In his desperate effort to generate some kind of federal question to permit this Court to hear this case under Rule 10, Petitioner focuses on the words "purposeful avoidance of the truth" from the Harte-Hanks opinion, seeking to expand that wording into the sole definition of the "reckless disregard" prong of the constitutional malice standard. Petitioner distorts this Court's opinion in Harte-Hanks and then ignores the Court's later opinion in Masson to create some "unsettled" question of federal law. There is no uncertainty or unclarity in

the Court's formulation and definition of the constitutional malice standard. The standard is well-known and well-understood by federal and state judges across the land. Disagreements arise in the application of that standard to particular facts in each case. The fact that Freeman continues to disagree with the legal conclusions of seven New York Court of Appeals judges does not, ipso facto, create an unsettled federal question.

In the wake of this Court's formulation of the constitutional malice standard (i.e., "knowledge of falsity or a reckless disregard for the truth") in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court almost immediately began to struggle with the meaning of the term "reckless disregard for the truth". In Garrison v. Louisiana, 379 U.S. 64, 74, (1964), the Court said that to meet the

reckless disregard standard, the plaintiff must present evidence to permit the conclusion that the defendant actually had a "high degree of awareness of ... probable falsity." Four years later in St. Amant v. Thompson, 390 U.S. 727, 731 (1968), this Court continued its exploration of what would constitute reckless disregard of the truth: "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The Court went on to state that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732.

However, this Court stated that the term "reckless disregard" "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication...." Id. at 730.

Those definitional terms of "high degree of awareness of probable falsity," "entertained serious doubts", and "obvious reasons to doubt" have been repeated and invoked since 1968 in nearly every libel case involving the issue of the existence of constitutional malice. (The opinion of the court below was no exception.) Certainly, this Court's opinion in Harte-Hanks primarily relied on these definitional terms in discussing the meaning of constitutional malice. 491 U.S. at 688. In discussing the evidence of what the journalist did in Harte-Hanks, this court said in passing: "Although

failure to investigate will not alone support a finding of actual malice, see St. Amant, 390 U.S. at 731, 733, the purposeful avoidance of the truth is in a different category." 491 U.S. at 692. The Court, however, did not declare "purposeful avoidance of the truth" to be a separate and independent standard or indeed, an alternative standard. It did not even use that wording when discussing the meaning of the term "reckless disregard" four pages earlier in the opinion.

Furthermore, this Court did not even refer to that sentence about "purposeful avoidance" when it discussed the meaning of constitutional malice two years later in Masson v. New Yorker Magazine, Inc., __ U.S. __, 111 S.Ct. 2419 (1991).

Upon remand in Masson, the United States Court of Appeals for the Ninth

Circuit explicitly followed Harte-Hanks in stating that to overcome a summary judgment, a public figure libel plaintiff "must establish by clear and convincing evidence that the publisher of an allegedly defamatory book or article 'in fact entertained serious doubts as to the truth of his publication.'" Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 899-900 (9th Cir. 1992). The Ninth Circuit, having adopted the "serious doubt" wording of this Court as the overall test, stated that that standard could be met in two ways: (1) demonstrate the publisher had "a high degree awareness of probable falsity"; or (2) the publisher had "obvious reasons to doubt the veracity" of the facts and the publisher "failed to take reasonable steps to dispel those doubts." 960 F.2d at 900. The Ninth Circuit's reliance on the words

"purposeful avoidance of the truth" only came into play when discussing whether reasonable steps were taken to dispel pre-existing, obvious doubts.

Comparing the Ninth Circuit's analysis in Masson of the definition of "reckless disregard" with the New York Court of Appeals' opinion here, reveals no possible conflict between Masson and Freeman. The Ninth Circuit referred to the "entertained serious doubts" test as the primary, overall definition of "reckless disregard". Similarly, the New York Court of Appeals only refers to the "entertained serious doubts" definition in exploring the "reckless disregard" standard. 84 N.Y.2d at 58; 614 N.Y.S.2d at 380. Petitioner's convoluted interpretations of the Harte-Hanks and Ninth Circuit's Masson opinion do not make sense when these two opinions are

compared. Petitioner talks about a "two part purposeful avoidance analysis," whereas the Ninth Circuit Masson opinion never refers to such a test. In short, there is no uncertainty among lower courts; there is no unsettled law.

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Dated: October 28, 1994

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No. 94-566

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MOIRA JOHNSTON,

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Court Should Grant the Petition to Clarify the "Purposeful Avoidance of the Truth" Doctrine

Respondent's arguments do not even acknowledge that "purposeful avoidance of the truth" is a distinct test for establishing the serious doubt necessary for the reckless disregard branch of actual malice. This misreading of this Court's decision in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) and the Ninth Circuit's decision in *Masson v. New Yorker Magazine*, 960 F.2d 89 (9th

Cir. 1992), does nothing but highlight the confusion evident in the New York Court of Appeals' decision. By requiring "serious doubt" as the level of "doubt" inherent in the "obvious reason to doubt" necessary for the "purposeful avoidance of the truth" doctrine the New York Court's decision has rendered that doctrine meaningless.

Clarification of the "purposeful avoidance of the truth" doctrine is not an academic exercise as respondent infers. It is an absolute necessity to maintain the delicate balance between First Amendment interests and the protection of reputation which the Court has so carefully designed. Resolution of this issue will define in a predictable manner for the bench, the bar and the media the responsibility of the media and the concerns of the First Amendment when the media have information which support different conclusions and fail to check with known accessible sources who have personal knowledge of the truth.

Petitioner agrees that ultimately "serious doubt" must be shown to have been entertained by respondent to constitute "reckless disregard." However, the Ninth Circuit in *Masson* specifically states in interpreting the purposeful avoidance doctrine set forth in *Harte-Hanks* that one of the ways to establish reckless disregard is to show that (1) the circumstances surrounding publication gave the publisher "obvious reason to doubt the veracity of the [author] or the accuracy of the [facts and quotations in her book or article]," *and* that (2) "the publisher failed to take reasonable steps to dispel those doubts." *Masson*, 960 F.2d at 900. The *Masson* court describes the above two-part test[1] as a "different path(s) to the same

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[1] Respondent makes the preposterous argument that *Masson* does not set forth a two part "purposeful avoidance of the truth" analysis. Yet, the *Masson* court, specifically states: "The New Yorker had developed 'obvious reasons to doubt' the accuracy of the quotations but, in an effort to 'purposeful[ly]

(Footnote continued)

conclusion [of recklessness]," as establishing a high degree of awareness of falsity. *Id.*

The above two-part test which allows a jury to infer that serious doubt was entertained and that, therefore, reckless disregard existed, requires a level of "doubt" in the "obvious reason to doubt" test that does not by itself constitute reckless disregard.[2] Requiring an initial level of "serious doubt" in the "obvious reason to doubt" test would end any need for further analysis of a journalist's actions to dispel doubt, since serious doubt by itself is sufficient to prove reckless disregard. Neither this Court in *Harte-Hanks*, nor the Ninth Circuit in *Masson* explaining the *Harte-Hanks* purposeful avoidance doctrine, intended to set forth a meaningless doctrine and test.

Respondent's arguments that petitioner seeks to establish a new constitutional test or a new standard or a negligence standard for public figures or is seeking to expand the purposeful avoidance doctrine into the sole definition of reckless disregard or is merely attempting to "second guess" the New York Court of Appeals on the factual record are preposterous. Petitioner solely seeks to have this Court clarify the level of doubt involved in the "obvious reason to doubt" *test*, which as interpreted by the New York Court of Appeals is

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avoid[] ... the truth,' failed to conduct a reasonable investigation of Masson's claims of inaccuracy." *Masson*, 960 F.2d at 901. *See also*, *Masson* at footnote 5, specifically referring to the two part test as the "standard prescribed by the Supreme Court in *Harte-Hanks*." *Id.*

[2] Petitioner does not contend as respondent claims that any possible difference in information between two sources obligates a journalist to seek other verification. Rather, the "doubt" that triggers a journalist's obligation to act reasonably and dispel doubt must be less than the level of "serious doubt" ultimately necessary to have been entertained by a journalist to establish "reckless disregard."

directly contradictory to this Court's holding in *Harte-Hanks* and the Ninth Circuit analysis in *Masson*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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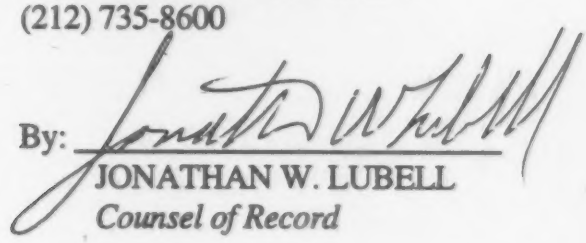
By: 
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